BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

BETHLEHEM STEEL CORPORATION
(Petitioner-Appellant)

PRECEDENT
TAX DECISION
No. P-T-33
Case No. T-66-87

Employer Account No.

DEPARTMENT OF EMPLOYMENT
(Respondent)

The petitioner has appealed from Referee's Decision No. SF-T-1117 which denied its petition for review. The procedural character of the petition is viewed differently by the opposing parties. The petitioner seeks to exercise an asserted right of review under the provisions of Unemployment Insurance Code section 1055 relating to transfers of reserve accounts. The department views the petition as presenting an issue for review solely under the provisions of code section 1035, relating to protests of rates and charges. The referee's decision adopts the department's procedural viewpoint. The parties have presented both written and oral argument to us.

STATEMENT OF FACTS

The petitioner, Bethlehem Steel Corporation, is a Delaware corporation. Prior to January 1, 1965, it was a separate legal entity from its wholly owned subsidiary, Bethlehem Steel Company, which was a Pennsylvania corporation. Effective as of midnight, December 31, 1964, the separate corporate existence of the "Company" ceased by virtue of its merger into the "Corporation."

For some years prior to this merger, the "Company" had been an operating arm in California and elsewhere of what is referred to in the record as the "Bethlehem group." In addition to the petitioner and the "Company," this group also included at least one other corporation, the Bethlehem Limestone Company. This was also a wholly owned subsidiary of the petitioner.

The "Limestone Company" was a principal supplier of raw materials to the group. It was also merged into the petitioner at the same time as the "Steel Company." There is no indication in the record before us that the "Limestone Company" ever operated in this state.

Prior to the merger of these two companies into the petitioner, a special meeting of the stockholders of the petitioner was held to vote on the merger agreement. A proxy statement included with the notice of the meeting described the then existing relationship between the "Steel Company" and the petitioner "Corporation" in these words:

> "The Corporation is primarily a holding company, owning stock and other securities of its operating subsidiaries. . . . It does not directly operate any properties in the United States. The Steel Company is its steel making and manufacturing subsidiary and owns and operates all the steel plants, shipyards, fabricating works and manufacturing units in the Bethlehem group. . . ."

The proxy statement then went on to describe what would occur in the merger in this way:

> "In the merger, the separate corporate existence of the Steel Company and the Limestone Company will cease, all their properties and obligations will be transferred to the corporation, and the corporation will succeed to the business formerly carried on by them."

The effect that the merger would have was described to the stockholders in this proxy statement. They were told that:

> "The merger will simplify the Bethlehem corporate structure by eliminating two separate subsidiary corporations and concentrating the principal Bethlehem activities in the Corporation."

The merger agreement was approved by the stockholders. In accordance with its provisions, the ownership and operation of all of the "Company's" steel plants, shipyards, fabricating works and manufacturing units in this state were taken over by the petitioner. This was done as of midnight on December 31, 1964, without interruption in the continuity of business activity or employment of personnel.

By virtue of the "Company's" employment of personnel in this state prior to the merger, an "employing unit" came into existence which was registered with the Department of Employment as an employer and assigned account number 137-0220. On June 30, 1964, the balance in this account was such that this employer would be assigned the maximum contribution rate of 3.5 percent for the calendar year 1965. At that time, a new employer without merit rating experience would have been assigned a contribution rate of 3.2 percent.

The merger of the "Company" into the petitioner was not made either solely or even primarily for the purpose of obtaining a more favorable contribution rate. Its aim was solely to effectuate technical changes in the form of organization of the group without affecting its operating substance. There was no alteration or interruption of the business activities or functioning of the group.

The Department of Employment assigned a contribution rate of 3.5 percent on wages paid by the petitioner during 1965 upon the basis that the merger did not result in a change of "employer." This rate was based upon the experience of account number 137-0220, which the department continued in existence as the petitioner's account. The petitioner protested this rate upon the basis that it is a new "employer" without merit rating experience, and hence entitled to a contribution rate of 3.2 percent. The petitioner alleges that in essence the department has transferred the account of another "employer" to it, without any authority to do so since the petitioner has made no application for any such transfer.

REASONS FOR DECISION

The petitioner, Bethlehem Steel Corporation, seeks our review of:

> " . . . the denial by California Department of Employment dated April 6, 1965 of its protest against the determination transferring and assigning the reserve account, tax rate and account number of Bethlehem Steel Company to Bethlehem Steel Corporation. . . ."

It asks that the department be directed to establish a new reserve account, number and tax rate of 3.2 percent for the petitioner, and to refund all sums paid in excess of what would be due at that rate.

The petition does not identify the specific provisions of law under which the petitioner seeks our review. It becomes important, however, that we do so, because as an administrative review agency created by statute, our jurisdiction is special and limited to that which the legislature has granted us (Attorney General's Opinion No. NS-5217, 2 Ops. Atty. Gen. 442 at page 443; Attorney General's Opinion No. 50-195, 16 Ops. Atty. Gen. 214 at page 215; Attorney General's Opinion No. 60-264, 37 Ops. Atty. Gen. 133 at pages 134 and 135). We do not have general authority to review all actions of the Department of Employment or its director (See Tax Decisions Nos. 1089 and 2313 and Benefit Decision No. 6485).

The petitioner's request that we review an alleged transfer of reserve account would appear to indicate that it is seeking to invoke our review jurisdiction under Unemployment Insurance Code section 1055. Its request for review of an assignment of tax rate would appear to indicate that it seeks to invoke our review jurisdiction under code section 1035. Its request for a refund would appear to indicate that it seeks to invoke our review jurisdiction under code section 1180. Within the purview of the authority granted to us under these sections, we will proceed to review the issues presented by the facts of this matter and the contentions of the parties.

The crucial question underlying all of the petitioner's requests is whether the petitioner and its former subsidiary corporation are two different "employers" within the meaning of the Unemployment Insurance Code.

If they are, then it follows without question from the otherwise undisputed facts that an unauthorized transfer of reserve account has been made because the petitioner neither applied for any such transfer, nor continued in error or inadvertence to so report and pay contributions at its subsidiary's previously assigned rate, that it would be deemed to have so applied under the provisions of code section 1054. It also follows that without a transfer the petitioner, as a new employer, would not have sufficient employment experience to qualify for a merit rating, and thus would have to be assigned the tax rate at which all new employers are required to pay contributions to the fund.

None of this follows, however, if the petitioner and its former subsidiary are but one and the same "employer" within the meaning of the Unemployment Insurance Code. In that event, we must look to the petitioner to explain how it could be considered to be a new "employer," or how the experience of its former subsidiary could be that of a different "employer," or how (either with or without an application) there has been any transfer of experience from one "employer" to another. Accordingly, the solution to the controversy before us depends entirely upon the proper resolution of the question: Are the petitioner and its former subsidiary one "employer" or two within the meaning of the Unemployment Insurance Code?

From all appearances, it would seem that the petitioner believes that this question is fully resolved by the simple and undisputed fact that its subsidiary was a separate legal entity. To so conclude, however, is to overlook another fact - that for unemployment insurance purposes, the word "employer" is a statutorily defined term. The Unemployment Insurance Code does not define an "employer" in terms of being a legal entity, but as an "employing unit" that has and does certain additional things. Specifically, code section 675 states that:

> "'Employer' means any employing unit, which for some portion of a day, has within the current calendar year or had within the preceding calendar year in employment one or more individuals and pays wages for employment in excess of one hundred dollars ($100) during any calendar quarter." (Underscoring added.)

According to this definition, every employer is, first of all, an "employing unit." If a legal entity becomes an "employer," it is its character as an "employing unit" that makes it such. It is not the mere fact of legal entity that does so.

In our Precedent Decision No. P-T-19 we had occasion to discuss in detail this concept of an "employing unit," which is derived from Unemployment Insurance Code section 135. In particular, we discussed the development of the unity of enterprise principle which the courts of this state have enunciated and applied in a series of cases involving the proper identification of the employing unit. That discussion includes a detailed review of these court cases which is fully pertinent to the matter at hand. However, there is no need for us to repeat it at length here because it can be found in Precedent Decision No. P-T-19 at pages 10 to 15. We merely incorporate it here by reference.

It may be stated in summary that the concept of an "employing unit" refers (except in the case of an individual) to the type of organization of the unit rather than to its legal form. Accordingly, in the identification of the proper unit, emphasis falls upon its character as a business enterprise rather than as a legal entity. Legal form is of direct significance for various other purposes under the code and is never to be disregarded, but for the purpose of identifying the employing unit, its significance is only indirect in that the manner in which it is used may help to explain the nature, scope, and extent of the business enterprise and the intentions of its entrepreneurs. The governing consideration in the employing unit's identification is the functional rather than the formal organization of the business activity - that is, it is the enterprise rather than the entity.

The early judicial decisions from which the principle of unity of enterprise developed were ones involving primarily situations similar to the one at hand in that some change was made in the legal form of the enterprise without any change of substance in its conduct. In the leading case of McHenry's Inc. v. California Employment Stabilization Commission (1952), 112 Cal. App. 2d 245, 276 P. 2d 76, the joint owners of a restaurant business incorporated it without otherwise changing its operation.

In holding that the incorporation of the enterprise did not result in a change of employing unit, the appellate court said:

> "The meaning of the term 'employing unit or employer' as used in the statute is that these terms refer to the unity of enterprise and are not concerned with the shifting of . . . legal form of the same enterprise." (Underscoring added.)

The petitioner argues that the McHenry case and the others like it deal with factual and procedural circumstances which are distinguishable from the matter at hand. To the extent that this is true, it is merely a distinction without a difference. The essential thing is that each of these cases involved a change in the legal form of an enterprise without any change of substance in its conduct. The important question was whether, in consequence, there was a single "employing unit" or several. That question could not be resolved within the narrow framework of the particular factual or procedural circumstances out of which the case arose, but only by resort to the general concept of an "employing unit" as set forth in what is now code section 135.

The transfer provisions of the Unemployment Insurance Code do not define who is an "employing unit" nor (except in regard to certain particular applications to joint ventures) do they define who is an "employer." They merely use these terms which have already been specifically defined in earlier and more general provisions of the code. We fail to detect anything in the use of these terms in the transfer provisions which imports any statutory intent to alter the general pattern of the unemployment insurance law in regard to the meaning of these terms. Even the special definition of "employer" in connection with joint venture transfers does not purport to do so.

The petitioner's contention that it did not apply for a transfer has no meaningful bearing upon the resolution of the controversy at hand unless and until it is shown that employment experience from the account of another employer was in fact transferred to the petitioner's account. Where a change of entity does

not produce a change in the "employing unit," there is no change in the "employer" or in the employer account. The experience in the account accumulated by the old entity is automatically the experience of the new entity without any transfer, because under the concepts of the Unemployment Insurance Code, it is the same employer with the same account.

Directly illustrative of this point is the case of Westwood Photo Lab., Inc. v. Department of Employment (1961), Sacramento Superior Court No. 122054, in which two individuals had engaged for ten years as equal partners in a business of wholesale photo finishing and retail sales of cameras and photo supplies. Those individuals decided to incorporate the photo finishing portion of the business only, and to continue the sales of cameras and supplies as a partnership. Stock in the new corporation was issued equally to the two partners, and except for this technical change in the form of the business, the enterprise continued to be conducted exactly as it had been before.

Under these circumstances, the court said that:

> " . . . [T]he employing unit has not changed except in form. In all other respects, it is the same and no logical reason has been advanced as to why the two segments of the employing unit, namely the partnership and the corporation having earned its experience rating, should not be entitled to retain the benefit thereof. There has not been a new or different employing unit requiring the application of Section 1051. . . ."

The court went on to point out specifically that the term "employing unit" is defined in code section 135, and that hence the unity of enterprise principle does not involve a transfer application under code section 1051. The parties were mistaken in proceeding with the matter in that light. Where a unity of enterprise exists, there is not a transfer from one employing unit to another but a continuation of the enterprise by the same employing unit, irrespective of the change in legal form of the entities involved.

In our opinion, the mere change in legal entity which occurred at midnight on December 31, 1964, when the Bethlehem Steel Company was merged into the petitioner corporation, did not create a new employer for unemployment insurance tax purposes. Since it did not, the tax rate set by the department for the petitioner based on the previous experience of the "Company" is correct, and no right to the refund of any amount paid has been shown. The use of the "Company's" experience in setting the petitioner's rate involved no transfer of reserve account, and upon that basis there is no merit to the petitioner's contention that such a transfer was wrongfully made without application for it. No departmental action under the transfer provisions of the code is involved, and no basis for relief under the review provisions of these sections has been shown.

We might add this comment about recognition of the enterprise rather than the entity as the governing consideration in identifying the employing unit. The general effect of this approach is to impose employer taxes more equitably. Generally, too, it operates to reduce them, either by preventing the imposition of unjust double or multiple taxation, or through the operation of more favorable merit rating. It is most unusual for an employer who has experience that qualifies it for a merit rating to have a higher tax rate than an employer who does not so qualify.

However, the employment experience accumulated over the years by the Bethlehem Steel Company in the operation of the enterprise in question was sufficiently poor and sufficiently costly to the Unemployment Fund that it actually works out that under the law the petitioner will be required to pay a few tenths of one percent more tax as an experienced employer than it would be as a new one. This, however, need not be a continuing thing, if the petitioner can improve upon this poor experience. Code section 1027.1 provides for the cancellation of all negative reserve balances accumulated in employer accounts before July 1, 1966 after the balances on the previous day have been used to compute the 1967 tax rates. This means that these unfavorable old balances will no longer be a part of an employer's experience in the computation of tax rates for 1968 and succeeding years.

It is to this kind of relief rather than to the kind here sought that employers in the petitioner's position must look. We must apply the unity of enterprise principle in the identification of any employer whenever such a unity exists. We cannot treat employers differently in those few instances where proper application of the principle acts to increase rather than reduce their tax rates. Any exception of this kind is the province of the legislature.

DECISION

The decision of the referee is affirmed.

Sacramento, California, December 10, 1968.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

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